Lim Chau Leng v Wong Chee Chong

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1100 OF 2001
FAIZA TAMBY CHIK J
29 AUGUST 2005

Civil Procedure — Consent orders — Breach of consent order — Divorce proceedings — Institution of Committal proceedings — Whether consent order was an order of the court in the true sense with directions — Whether court decided anything on merits — Whether consent order a record of the agreement of the parties with seal of the court on it — Whether consent order an order of the court with imperative directions or coerciveness

The defendant husband raised the issue that a breach of a consent order dated 12 November 2003 made voluntarily between the defendant husband and the plaintiff wife through their respective counsels and recorded as such by the court cannot amount to a contempt of court. Leave was granted ex parte for commencement of committal proceedings. The terms of the consent order recorded by this court on 12 November 2003 were negotiated and agreed upon by the plaintiff and defendant before the matter was called up for full trial. As a result of the compromise reached by the parties out of court, the divorce petition was not contested and was disposed of without consideration and decision on merits.

Held:

(1) The consent order entered by consent with the plaintiff was an embodiment of the terms agreed between the parties before the trial of the divorce petition. But, it was not an order of the court in the true sense with directions. The court did not decide anything on merits. No decision or direction was made by the court on the hearing of the divorce petition. The court merely recorded the agreement of the parties and set the seal of the court on it (see para 8).

(2) Had the divorce petition been heard on its merits and the court had come to a finding of fact on all issues after having taken evidence and ordered the defendant to do all that is now found in the consent order, then that would be an order of the court which is in coercive terms and a breach of which would attract committal proceedings for contempt of court. It is not the spirit and intent of the law of contempt to punish a party who enters into a bargain with another and formalised before a judge, if that party subsequently fails to fulfill the terms of the bargain. The failure to carry out the terms, although a breach, is not susceptible to contempt proceedings. The rationale for holding thus is because the affront by breach is not to the court but the party to the compromise or consent order. The offence if any, is committed by one party against the other and not the court which negates the very foundation for proceeding for contempt of court (see para 9).

(3) The terms agreed upon came from the parties to the court and not from the court to the parties. It was never denied that the consent order with the seal of the court affixed to it made it a court order. But it is not an order of the court with imperative directions or coerciveness. It lacked coerciveness taking into account the manner the consent order came about (see para 10); *Badri Dass v Labhu Mal* AIR 1959 Punjab 322 referred.

(4) In this case, there was a set of promise made by the defendant to the plaintiff to do or not to do an act. That is all. There were no promises made to the court by the defendant. The court merely acknowledged this agreement by affixing its seal which brought the suit to an end. The defendant by making these promises (and the plaintiff accepting them) did not hoodwink the court into bringing the suit to an end. The decision to compromise and to end the suit was entirely by the parties. The law of contempt of court does not envisage institution of committal proceedings for a breach of a term agreed by parties merely because it is embodied in a court order (see para 11).

[Bahasa Malaysia summary

Defendan suami telah menimbulkan persoalan bahawa perlanggaran suatu perintah mahkamah bertarikh 12 November 2003 yang dibuat secara sukarela antara defendan suami dan plaintif isteri melalui peguam masing-masing dan direkodkan sedemikian oleh mahkamah tidak boleh membentuk satu penghinaan mahkamah. Kebenaran diberikan secara ex parte untuk prosiding komital dimulakan. Terma-terma perintah persetujuan yang direkodkan oleh mahkamah ini pada 12 November 2003 telah dibawa berunding dan dipersetujui oleh plaintif dan defendan sebelum perkara tersebut dipanggil untuk perbicaraan penuh. Hasil kompromi yang dicapai oleh pihak-pihak di luar mahkamah, petisyen perceraian tidak ditandingi dan diselesaikan tanpa balasan dan keputusan berdasarkan merit.]

Diputuskan:

(1) Perintah persetujuan yang disempurnakan dengan persetujuan plaintif membentuk terma-terma yang dipersetujui antara pihak-pihak sebelum perbicaraan petisyen perceraian. Namun, ia bukan satu perintah mahkamah dalam erti sebenar dengan arahan. Mahkamah tidak memutuskan apa-apa berdasarkan merit. Tiada keputusan atau arahan telah dibuat oleh mahkamah semasa perbicaraan petisyen perceraian. Mahkamah hanya merekodkan persetujuan pihak-pihak dan memeterai cap mohor mahkamah atasnya (lihat perenggan 8).

(2) Sekiranya petisyen perceraian telah didengar berdasarkan meritnya dan mahkamah tiba ke satu penemuan fakta berhubung semua persoalan setelah meneliti keterangan dan memerintahkan defendan melaksanakan segala yang kini terdapat dalam perintah persetujuan, maka ia akan menjadi perintah mahkamah yang mempunyai terma-terma yang bersifat memaksa dan suatu perlanggaran yang mengundang prosiding komital untuk penghinaan mahkamah. Ia juga bukan hasrat dan niat undang-undang penghinaan untuk

menghukum satu pihak yang memasuki satu tawaran dengan satu lagi dan merasmikannya di hadapan hakim, jika pihak itu gagal untuk memenuhi terma-terma tawaran itu. Kegagalan untuk melaksanakan terma berikut, meskipun satu perlanggaran, tidak mudah untuk memerlukan satu prosiding komital. Rasional keputusan ini adalah kerana yang melakukan perlanggaran bukan kepada mahkamah tetapi pihak kepada perintah kompromi atau persetujuan itu. Kesalahan jika ada, dilakukan oleh satu pihak terhadap satu lain dan bukan mahkamah yang menidakkan asas untuk prosiding penghinaan mahkamah (lihat perenggan 9).

(3) Terma-terma yang dipersetujui datangnya daripada pihak-pihak kepada mahkamah dan bukan daripada mahkamah kepada pihak-pihak itu. Tidak boleh dinafikan bahawa perintah persetujuan dengan meterai mahkamah dicopkan kepadanya menjadikannya satu perintah mahkamah. Namun ia bukan perintah mahkamah dengan arahan yang imperatif atau memaksa. Ia kurang memaksa dengan mengambilkira cara perintah persetujuan itu timbul (lihat perenggan 10); *Badri Dass v Labhu Mal AIR* 1959 Punjab 322 dirujuk.

(4) Dalam kes ini, terdapat satu set perjanjian yang telah dibuat oleh defendan kepada plaintif untuk melakukan atau tidak melakukan suatu tindakan. Itu sahaja. Tiada janji telah dibuat oleh defendan. Mahkamah hanya mengesahkan bahawa perjanjian ini dicopkan dengan meterainya yang oleh demikian menamatkan guaman itu. Defendan dengan membuat janji-janji tersebut (dan plaintif menerimanya) tidak memperdayakan mahkamah untuk menamatkan guaman itu. Keputusan untuk berkompromi dan menamatkan guaman itu terpulanglah kepada pihak-pihak tersebut. Undang-undang penghinaan mahkamah tidak membentuk institusi untuk prosiding komital kerana perlanggaran terma yang dipersetujui oleh pihak-pihak hanya kerana ia terkandung dalam perintah mahkamah (lihat perenggan 11).

Notes

For cases on consent orders generally, see 2 *Mallal's Digest* (4th Ed) Consolidated Subject Index, paras 1502–1527.

Cases referred to

Badri Dass v Labhu Mal AIR 1959 Punjab 322 (refd)

Dashwood v Dashwood (1927) WN 276 (refd)

Hudson, Re (1966) 1 Ch 209 (refd)

Pulavarthi Venkata Subba Rao & Ors v Valluri Jagannadha Rao (deceased, by his heirs and legal representatives) & Ors AIR (54) 1967 Supreme Court (refd)

Tan Geok Lan v La Kuan @ Lian Kuan [2004] 3 MLJ 465 (refd)

Webster v Southwark London Borough Council [1983] QBD 698 (refd)

Legislation referred to

Rules of the High Court 1980 O 52 r 2(2)

Sharen Ram (Yogan & Associates) for the plaintiff wife.

Paari Perumal (Joseph Clemons with him) (J Clemons & Associates) for the defendant husband.

Faiza Tamby Chik J:

[1] In this case, the defendant husband is raising the issue that a breach of a consent order dated 12 November 2003 made voluntarily between the defendant husband and the plaintiff wife through their respective counsels and recorded as such by the court cannot amount to a contempt of court. Leave was granted ex parte on 26 January 2005 (encl 44). The notes of evidence showing the recording of the consent order by the court on 12 November 2003 read as follows:

> NOTA KETERANGAN
>
> Catitan daripada Buku 3 Mahkamah Terbuka
>
> Mukasurat 303
>
> *33-11-01*
>
> Lim Chau Leng — Plaintif
>
> Wong Chee Chong — Defendan
>
> Lampiran (1)
>
> Yogan bagi pihak Plaintif Isteri
>
> PA Selvi bagi pihak Defendan Suami
>
> Kedua-dua pihak hadir
>
> Yogan: Resolved.
>
> To record Consent Order.
>
> PA Selvi: I confirm.
>
> Shown
>
> Consent Order
>
> Marked
>
> Lampiran (30)
>
> Mahkamah: Terma-terma dalam Lampiran (30) diluluskan.

[2] The terms of the decree nisi recorded by this court on 12 November 2003 were negotiated and agreed upon by the plaintiff and defendant before the matter was called up for full trial on 12 November 2003. As a result of the compromise reached by the parties out of court, the divorce petition was not contested and was disposed of without consideration and decision on merits. Clearly, the decree nisi by mutual consent of the parties recorded by the court was a contract between the parties with the sanction of the court superadded to it. In *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465, Mohd Noor Ahmad FCJ delivering the judgment for the Federal Court said at p 472:

> On the first issue, which is related to question (1), a consent judgment or order is non the less a contract, and subject to the incidents of a contract, because there is superadded the

command of the court, and its force and effect derivers from the contract between the parties leading to, or evidenced by, or incorporated in, the consent judgment or order. A consent order must be given its full contractual effect, even if it relates to an interlocutory step in the action (see para 390 at p 286, *Halsbury's Law of England* (4th Ed) Vol 37). We gather from this proposition that: (i) the agreement on the terms reached between the parties at the interlocutory state of an action is a contract between the parties; and (ii) the consent judgment or order arising out of that contract is also a contract between the parties except that the latter is superadded by the command of the court. In short, there are two contracts, one, before the court makes the order and two, after the order is made. After the order is made the first contract is merged into the second contract.

It is undisputed by parties that the decree nisi by consent dated 12 November 2003 was recorded by a court of competent jurisdiction. However what is in dispute is the consequence of breaching or disobeying the said decree nisi. Is the defendant guilty of contempt of court if he breaches or disobeys the said decree nisi? A perusal of the statement pursuant to O 52 r 2(2) of the Rules of the High Court 1980 accompanying the notice of motion (encl 40) stipulates three purported breaches of the terms in the decree nisi. These are the charges levied at the defendant. They are found at paras 5, 6 and 7. It is important that I reproduce below the relevant terms of the decree nisi dated 12 November 2003 marked as encl (30) which are said to have been breached or disobeyed by the defendant:

(i) Para (d) — Responden membayar nafkah bulanan sebanyak RM650 mulai dari bulan Januari 2001 sebagai peruntukan kewangan untuk anak Timothy Wong Chee Khang pada tiap-tiap 1 haribulan dan peruntukan ini berterusan sehingga Timothy Wong Chee Khang mencapai umur 18 tahun;

(ii) Para (e) — Responden perlu membuat peruntukan kewangan selanjutnya untuk menanggung perbelanjaan pendidikan dengan penuh untuk Timothy Wong Chee Khang dari tadika sehingga pengajiannya ke Kolej dan Universiti;

(iii) Para (g) — Responden dihalang sama sekali pergi atau hadir di Unit 06C, Type No C, Floor 13A, Block B, Accessory Parcel No 1-113, Pelangi Indah Condominium, Batu 4½, Kuala Lumpur ataupun berada di mana-mana berhampiran hartanah tersebut dalam lingkungan 200m tetapi hanya untuk mengambil Timothy Wong Chee Khang dari pondok pengawal hartanah tersebut dan juga responden dilarang sama sekali menalipon, mengugut dan atau melakukan sebarang tindakan kekacauan ke atas dan terhadap pempetisyen.

It is worth to note at this juncture that the decree nisi dated 12 November 2003 states, 'MAKA DENGAN INI ADALAH DIHAKIMI SECARA PERSETUJUAN' and goes on to enumerate the terms agreed upon.

[3] It is argued by Mr Paari Perumal, counsel for the defendant husband that there is no use of the word 'undertake' in any of the three terms referred to here above. The court also cannot construe the decree nisi itself and the terms therein as an implied undertaking given by the defendant. To support his contention Mr Paari Perumal quoted the following cases:

Nisha Kanto Roy Chowdhury v Smt. Saroj Bashini Goho AIR (35) 1948 Calcutta 294 is a case where the suit was not contested when the parties came to an agreement. The compromise was presented to the court and a decree was passed in terms of the compromise. The term

of the decree on which the respondent applied to commit the appellant for contempt of court read, 'The defendant hereby undertakes to remove …', it did not state that the defendant undertook to the court to do so. The defendant refused to remove the item in question. Gentle J, the learned single judge decided there was contempt by a breach of an undertaking to the court. On appeal, the Letters Patent Bench dismissed the application for committal as there was no contempt. At para 13, Harries CJ delivering the leading judgment said, 'It therefore follows that if the ordinary meaning is given to the word 'undertake' para 6 should read: the defendant hereby formally promises or pledges to remove the said Kali image … '. What the respondent urges us to do is to read into para 6 the words 'undertakes to court'. The words are not there.

At para 14, the learned CJ stated, 'It must be remembered that this compromise agreement was negotiated between the parties outside court. They were agreeing to certain terms and amongst other things the defendant promised or undertook to remove this image when called upon to do so. The agreement he made was not with the court, but with the plaintiff respondent, and prima facie he undertook to remove this image with the plaintiff respondent.'

At para 18, the learned CJ said, 'It must be remembered that a compromise decree is nothing more than an agreement of the parties with the sanction of the court superadded. It has really no greater sanctity than the agreement itself. It certainly cannot mean anything more than the agreement itself.'

Finally at the end of para 20, the judge says, 'In the present case, it appears to me on a true construction of para 6 of the compromise, that there was nothing more than a solemn promise by the defendant to the plaintiff and the nature of that promise or undertaking could never be changed by reason of the compromise being accepted by the court and a decree passed in its terms.'

It is observed that the above case is one where the word 'undertake' was used in the consent order recorded by the court. In this case, there is no use of the word 'undertake' at all in any of the three terms which the plaintiff alleges the defendant has breached.

Bukhtiarpur-Bihar Light Rly Co Ltd v State of Bihar & Ors AIR (38) 1951 Patna 231 is a case where a consent order was passed and it recites the agreement arrived at between the parties. The consent order begins thus, 'This application is disposed of on the following consent order agreed to by the parties.' There was no use of the word 'undertake' anywhere. Justice Das at para 21 said as follows: '…. I agree with his (referring to his learned brother Reuben J) conclusion that that agreement was a contract between the parties and not an undertaking to the court. The distinction between an agreement with the sanction of the court superadded to it, and an undertaking to the court on the faith of which the court sanctions a particular course of action or inaction is not easy to define or determine; much will depend on the circumstances in which the agreement is made, and the words in which it is expressed to embody the intention of the parties (see *Nisha Kanto*'s case). The agreement in this case did not result in any order of the court, except disposal of the application without consideration of merits ….'

Further on in the same para 21 the learned judge states: '…. Of course, the formal order of disposal is there, but that does not convert the agreement into an undertaking to this court. It is worthy of note that the order of 22 June 1950, as recorded, states clearly — 'it is agreed to by the parties etc.' There is nothing to suggest that there is an undertaking given to the court on the faith of which the court is sanctioning a particular course of action or inaction. Mr Das has contended that on the basis of the agreement the court refrained from deciding the case on merits, and this would bring the agreement within the category of an undertaking on the faith of which the court sanctioned a particular course of inaction, that is, refrained from deciding the case on merits. I agree that the court refrained from

deciding the case on merits; but that does not necessarily mean that the court did so on the faith of undertaking given to the court. If Mr Das's contention is correct, then every action which is dismissed on compromise, without decision on merits, will give rise to a proceeding in contempt on a breach of a term of the compromise. I do not think that that is correct in law.'

In this case, I think even assuming for one moment that there has been a breach of the terms of the decree nisi as contended by the plaintiff, then that does not constitute contempt of court. This is fortified by the view of Das J at para 24 where his Lordship states, 'My view, therefore, is that there has been in law a breach of the agreement of 23 June 1950 but it is not a breach of an undertaking to this court nor does it constitute contempt of this court.'

Badri Dass v Labhu Mal AIR 1959 Punjab 322 is a case where the defendant agreed to pay the plaintiff's claim in instalments and further undertook not to alienate any part of his immovable property till the entire amount was paid as agreed upon by the parties. The suit was decreed on those agreed term. The defendant alienated the shop which the plaintiff sought to attach in breach of his undertaking. The learned Justice GL Chopra applying the principles enunciated in *Bakhtiarpur Bihar Light Rly*'s case said at para 3: 'The statement of the defendant read as a whole leaves no doubt in my mind that it was based upon a private compromise arrived at between the parties outside the court. Instead of presenting a written composition deed the defendant detailed the terms of the compromise in his statement and a decree on the basis of it was passed. The undertaking was thus not given to the court but to the plaintiff. It was no more than a solemn promise by the defendant to the plaintiff and the nature of that promise or undertaking could never be changed by reason of the compromise being accepted by the court and a decree passed in its terms. The principle is well settled that the breach of such an undertaking or promise does not amount to contempt of court.'

Babu Ram Gupta v Sudhir Bhasin & Anor AIR 1979 Supreme Court 1528 is an appeal by the appellant to the Supreme Court against the decision of the Division Bench of the Dehli High Court which convicted the appellant and sent him to detention in civil prison. The High Court held that the conduct of the appellant was unrelenting and inexorable and he had wilfully disobeyed the order of court passed with his consent. The Supreme Court eventually quashed the decision and acquitted the appellant. Justice Fazal Ali while speaking for the Supreme Court stated at para 7: '… Although the High Court observed that the consent order extracted above had been passed on the basis of various undertakings given by the contemner, we are unable to find any material on record which contains such undertakings. It seems to us that the High Court has construed the consent order itself and the directions contained therein as an implied undertaking given by the appellant. Here the High Court has undoubtedly committed an error of law. There is a clear cut distinction between a compromise arrived at between the parties or a consent order passed by the court at the instance of the parties and a clear and categorical undertaking given by any of the parties. In the former, if there is violation of the compromise or the order no question of contempt of court arises but the party has a right to enforce the order or the compromise by their executing the order or getting an injunction from the court.'

At para 10 the learned judge goes on to say: '… What the High Court appears to have done is that it took the consent order passed which was agreed to by the parties and by which a receiver was appointed, to include an undertaking given by the contemner to carry out the directions contained in the order. With due respect, we are unable to agree with this view taken by the High Court. A few examples would show how unsustainable in law the view taken by the High Court is. Take the instance of a suit where the defendant agrees that a decree for Rs10,000 may be passed against him and the court accordingly passes the decree. The defendant does not pay the decree. Can it be said in these circumstances that merely because the defendant has failed to pay the decretal amount he is guilty of contempt of court? The answer must necessarily be in the negative. Take another instance where a

compromise is arrived at between the parties and a particular property having been allotted to A, he has to be put in possession thereof by B. B does not give possession of this property to A. Can it be said that because the compromise decree has not been implemented by B, he commits the offence of contempt of court? Here also the answer must be in the negative and the remedy of A would be not to pray for drawing up proceedings for contempt of court against B but to approach the executing court for directing a warrant of delivery of possession under the provisions of the Code of Civil Procedure. Indeed, if we were to hold that non-compliance of a compromise decree or consent order amounts to contempt of court, the provisions of the Code of Civil Procedure relating to execution of decrees may not be resorted to at all. In fact, the reason why a breach of clear undertaking given to the court amounts to contempt of court is that the contemner by making a false representation to the court obtains a benefit for himself and if he fails to honour the undertaking, he plays a serious fraud on the court itself and thereby obstructs the course of justice and brings into disrepute the judicial institution. The same cannot, however, be said of a consent order or a compromise decree where the fraud, if any, is practised by the person concerned not on the court but on one of the parties. Thus, the offence committed by the person concerned is qua the party not qua the court, and therefore, the very foundation for proceeding for contempt of court is completely absent in such cases. In these circumstance, we are satisfied that unless there is an express undertaking given in writing before the court by the contemner or incorporated by the court in its order, there can be no question of wilful disobedience of such an undertaking. Therefore I am of the opinion that this decision clearly illustrates why the defendant in the matter before me is not in contempt of court.'

In *Abdul Kareem v. Iswarappa & Ors* 1983 Cri LJ 114, the consent order upon which contempt proceedings were instituted read as follows: 'As agreed to by both the parties it is hereby directed that …'. Justice GN Sabhahit said at para 2, 'Thus it becomes clear that there is no order of the court as such and the agreement of the parties is recorded and nothing more. No undertaking as such is taken by the court. In such cases it is obvious that contempt proceeding cannot lie.'

Further at para 3, the learned judge stated the following applying the principles in *Babu Ram*'s case, 'Contempt proceedings are mainly to uphold the dignity and decorum of the court and not to vindicate the rights of the parties.' In this case before me, the decree nisi dated 12 November 2003 reads, 'MAKA DENGAN INI ADALAH DIHAKIMI SECARA PERSETUJUAN' which is similar to what the consent order read in Abdul Kareem's case.

In *Ladlay Mohan Mathur v RS Bhatnagar* 1985 All LJ 17, a consent decree was passed and in one of the clause the tenant gave an undertaking to vacate premises in dispute as per the terms recorded therein. The tenant disobeyed the undertaking given and the landlord initiated civil contempt proceedings which was consequently rejected. The court ruled that, 'In cases of violation of compromise or order, no question of contempt of court arises but party has right to enforce the order of compromise by either executing the order or getting an injuction.'

[4] In his well researched work titled, *The Law and Practice of Compromise* (5th Ed, 2002), David Foskett QC had this to say at p 194:

It should clearly be understood that an order for committal can be made only where there has been an undertaking to the court:

In *Marchant v Marchant*, H and W compromised proceedings brought by W against H on the basis of alleged wilful neglect to provide her with reasonable maintenance. The compromise consisted of a withdrawal of the summons on terms which included an undertaking by H 'not to resort to the matrimonial home as from 31 July 1964 or to

molest W', the words 'liberty to apply' also being incorporated. The Court of Appeal held that W could not apply to commit H to prison for an alleged breach of the undertaking because it was not an undertaking to the court.

[5] It is argued by the plaintiff that since she has been granted leave to take out committal proceedings the defendant cannot raise the present objection. I think the granting of leave does not amount to a finding of contempt. That can only happen at the hearing of the substantive motion upon proof beyond reasonable doubt. The objection raised is not procedural but substantive in nature. It goes to the root of the cause. The plaintiff argued that the defendant should have applied to set aside the leave order dated 26 January 2005 instead of raising this objection. It is not disputed that the leave order (obtained ex parte) was served together with encl (45) only on 17 March 2005. It is also not disputed that on 17 March 2005 when the leave order was served, encl (45) was already fixed to be heard on 31 March 2005. In this instance, it was only prudent that the defendant take all objections at the hearing of the motion and have it disposed once and for all instead of filing interlocutory applications to set aside the leave order and protract the hearing of encl (45).

[6] I must reiterate that it is not that committal proceedings cannot be instituted based on a decree nisi by mutual consent. That would amount to stating a general proposition of law. That is not intended here. I am confining to the decree nisi dated 12 November 2003 in this case. The decision by the Federal Court in *Tan Geok Lan* (see above) is simple to understand. If there is a consent order or judgment, what happens is that there will be two contracts, one, before the court makes the order and two, when the order is made. After the consent order is made the first contract is merged into the second contract. On the facts of *Tan Geok Lan*, there was no consent order because the court in that case did not order for a consent order to be recorded. So what remained there is the first contract the binding effect of which had to be based on incidents of a contract, i.e. offer, acceptance, consideration, etc. In our case, we have the consent order dated 12 November 2003 and as stated in *Tan Geok Lan*, it has taken the place of the initial agreement (arrived at by the negotiations of both parties out of court) by merger. What is meant by 'the legal effect is not derived from the agreement but from the court order' is that once a consent order is made, the incidents of a contract (offer, acceptance, consideration, etc) need not be proven. The wronged party may take out enforcement proceedings for a breach on the basis that there is a valid contract. The legal effect of an agreement incorporated in a consent order is derived from the consent order itself and not from the agreement of the parties made before the consent order is made. What is the consequence of breaching the consent order dated 12 November 2003? Can the plaintiff take out committal proceedings for its breach? The answer is that it depends. The decree nisi dated 12 November 2003 particularly the terms said to be in breach does not give rise to a proceeding in contempt. Contempt of court is a legal concept which only the court as the aggrieved party can make a finding of fact. And the indorsement of the penal notice is a procedural requirement by the Rules of the High Court 1980 if a party wishes to take out committal proceedings. It is not part of the substantive law of contempt of court.

Justice Fazal Ali of the Supreme Court of India put it aptly and neatly in *Babu Ram Gupta* when his Lordship said:

> There is a clear cut distinction between a compromise arrived at between the parties or a consent order passed by the court at the instance of the parties and a clear and categorical undertaking given by any of the parties. In the former, if there is violation of the compromise or the order no question of contempt of court arises but the party has a right to enforce the order or the compromise by their executing the order or getting an injunction from the court.

[7] In this case, the defendant at all times maintain that he has an agreement with the plaintiff to perform the terms of the decree nisi dated 12 November 2003. The plaintiff on the other hand flatly deny that there is any agreement between her and the defendant. The plaintiff is saying that the decree nisi dated 12 November 2003 entered by consent is not an agreement but an order of the court to do or not to do certain acts. Authorities have clearly shown that for there to be contempt of court based on a consent order, the consent order must contain an express undertaking to the court. The defendant has at all times maintained that he has not given any undertaking to the court. Clearly, the defendant is absolved of being guilty of contempt of court. It is interesting to note that by the plaintiff denying any agreement, it would appear that on the authority of *Re Hudson* (1966) 1 Ch 209, the plaintiff would not be entitled to claim anything from the defendant under the consent order dated 12 November 2003 as there is no collateral bargain between the parties (the plaintiff denies there is any agreement) which might have given rise to a debt recoverable at law. That would be the outcome of the plaintiff going on record denying that any agreement exist between the plaintiff and the defendant

[8] It is noted that the decree nisi dated 12 November 2003 (consent order) entered by consent with the plaintiff is an embodiment of the terms agreed between them before the trial of the divorce petition. But, it is not an order of the court in the true sense with directions. The court did not decide anything on merits. In *Pulavarthi Venkata Subba Rao & Ors v Valluri Jagannadha Rao (deceased, by his heirs and legal representatives) & Ors* AIR (54) 1967 Supreme Court, Justice Hidayatullah speaking for the Supreme Court of India stated as follows:

> The compromise decree was not a decision by the court. It was the acceptance by the court of something to which the parties had agreed. It has been said that a compromise decree merely sets the seal of the court on the agreement of the parties. The court did not decide anything. Nor can it be said that a decision of the court was implicit in it.

In our case, no decision or direction was made by the court on the hearing of the divorce petition on 12 November 2003. In fact, as stated in the foregoing case cited, the court merely recorded the agreement of the parties and set the seal of the court on it. This is evident if one peruses the decree nisi dated 12 November 2003.

In *Dashwood v Dashwood* (1927) WN 276, the question was whether, when an order was made by consent staying an action on terms set out in a schedule to the order, and one of the parties failed to comply with the terms, the remedy of the injured party was for contempt by way of motion for attachment or committal, or whether his proper course was first to take proceedings either independently or in the action to enforce the terms by obtaining against the offending party an order for specific performance or an injunction restraining him from breaking the terms. Tomlin J said:

> It seems to follow that the terms in the schedule were not an order of the court which ought directly to be enforced by proceedings for contempt.

In *Dashwood v Dashwood*, the terms which were broken were embodied in a schedule to the order made by consent. It nevertheless is a court order. And if the plaintiff is correct in her contention that all court orders are orders of the court, the court should and would have decided that it is proper to take out committal proceedings for contempt of court. The above case is an example for the proposition that not all court orders are coercive orders of the court, a breach of which will attract punishment for contempt of court.

Another example is a declaratory order. This again is a court order and if the plaintiff is correct in her contention then a breach or non-compliance of a declaratory order should be punishable for contempt of court. But as highlighted by Mr Paari Perumal in the case of *Webster v Southwark London Borough Council* [1983] QBD 698, the court held that as the order was declaratory and not coercive, the refusal of the local authority to comply with its terms did not amount to a contempt of court.

[9] I am of the opinion that had the divorce petition been heard on 12 November 2003 on its merits and the court had come to a finding of fact on all issues after having taken evidence and ordered the defendant to do all that is now found in the decree nisi dated 12 November 2003, then that would be an order of the court which is in coercive terms and a breach of which would attract committal proceedings for contempt of court. I think it is not the spirit and intent of the law of contempt to punish a party who enters into a bargain with another and formalised before a judge, if that party subsequently fails to fulfill the terms of the bargain. The failure to carry out the terms, although a breach, is not susceptible to contempt proceedings. This is because as Justice Fazal Ali stated in *Babu Ram Gupta*: Take the instance of a suit where the defendant agrees that a decree for Rs10,000 may be passed against him and the court accordingly passes the decree. The defendant does not pay the decree. Can it be said in the circumstances that merely because the defendant has failed to pay the decretal amount he is guilty of contempt of court? The answer must necessarily be in the negative.' The rationale for holding thus is because the affront by breach is not to the court but the party to the compromise or consent order. The offence if any, is committed by one party against the other and not the court which negates the very foundation for proceeding for contempt of court.

[10] What is important here is that the terms agreed upon came from the parties to the court and not from the court to the parties. It was never denied that the consent order dated 12 November 2003 with the seal of the court affixed to it made it a court order. But is it an order of the court with imperative directions or coerciveness. It lacks coerciveness taking into account the manner the consent order came about. I can only re-quote the passage from *Badri Dass v Labhu Mal* AIR 1959 Punjab 322 which reads:

> The statement of the defendant read as a whole leaves no doubt in my mind that it was based upon a private compromise arrived at between the parties outside the court. Instead of presenting a written composition deed the defendant detailed the terms of the compromise in his statement and a decree on the basis of it was passed. The undertaking was thus not given to the court but to the plaintiff. It was no more than a solemn promise by the defendant to the plaintiff and the nature of that promise or undertaking could never

be changed by reason of the compromise being accepted by the court and a decree passed in its terms. The principle is well settled that the breach of such an undertaking or promise does not amount to contempt of court.

[11] So, what we have in our case is a set of promise made by the defendant to the plaintiff to do or not to do an act. That is all. There are no promises made to the court by the defendant. The court merely acknowledged this agreement by affixing its seal which brought the suit to an end. The defendant by making these promises (and the plaintiff accepting them) did not hoodwink the court into bringing the suit to an end. The decision to compromise and to end the suit was entirely by the parties. The law of contempt of court does not envisage institution of committal proceedings for a breach of a term agreed by parties merely because it is embodied in a court order. If one spouse wishes to commit the other, than he or she or their legal advisers must procure an undertaking to the court to be incorporated in the consent order. In this judgment I dealt only with a preliminary issue of whether a breach of the consent order dated 12 November 2003 can attract committal proceeding. The issue of whether there is in fact a breach and all other defences available to oppose encl (45) was reserved till my decision on the preliminary issue.

[12] For these reasons, I hold that the defendant in this case cannot be the subject of a committal proceeding for contempt of court for allegedly breaching the said terms of the decree nisi dated 12 November 2003. It follows that encl (45) is hereby dismissed. No order as to cost.

Reported by Peter Ling